IN THE

Supreme Court of the United States

October Term, 1966

Office Supreme Court, U.S.
FILED
DEC 30 1966
JOHN F. DAVIS, CLERK

No. 807

KENNETH BURKARD and MORGAN SEIFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

No. 808

HENRY HABEL, ARTHUR McGOVERN and JULIO RODRIGUEZ,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

FRANK S. HOGAN
District Attorney
New York County
Attorney for Appellee
155 Leonard Street
New York, New York 10013
212-RE 2-7300

H. RICHARD UVILLER
MICHAEL JUVILER
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
JURISDICTION	2
STATEMENT	2
THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT PASSED UPON	6
THE RULINGS SOUGHT TO BE REVIEWED REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND	7
CONCLUSION	8

IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKARD and MORGAN SEIFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

No. 808

HENRY HABEL, ARTHUR McGOVERN and JULIO RODRIGUEZ,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeals in the above-entitled cases on the ground that they are not within the jurisdiction of this Court, because the questions sought to be reviewed were not passed upon by the state courts, and because the appellate rulings rest on an adequate non-federal basis.

Jurisdiction

Appellants seek to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Section 813-a of the New York Code of Criminal Procedure, authorizing court-ordered eavesdropping upon probable cause, is unconstitutional on its face, and unconstitutional as applied in this case. However, these questions were never passed upon by the state appellate courts, the Appellate Division and Court of Appeals holding instead that such issues were not reviewable on appeal because the judgments of conviction were based on pleas of guilty.

Since the pleas of guilty were entered upon a misunderstanding as to the scope of review under state law, the appellate courts announced that appellants could withdraw their pleas of guilty and raise their claims as to eavesdropping at a trial, if they were so disposed; instead, appellants seek to raise them in this Court. But the state appellate rulings, interpreting state appellate procedures, are not challenged by appellants, and involve no federal constitutional question.

Statement

On January 20, 1964, the appellants and co-defendant, William Griffin, were indicted for conspiring, on behalf of the International Brotherhood of Teamsters, to commit various crimes in connection with an inter-union rivalry for representation of employees of the New York Telephone Company (21-6).* On April 23, co-defendant Grif-

* References, unless otherwise noted, are to pages of the printed record on appeal to the New York Court of Appeals.

fin moved for a hearing under Section 813-c of the New York Code of Criminal Procedure, on an application to suppress evidence obtained by eavesdropping (27). Because of duplication in pleading, however, the indictment was superseded by another, filed June 12, 1964, which forms the basis for the present convictions (46-53; Ind-247½—1964). The first count charged a conspiracy to commit the crimes of assault, coercion and other crimes, and alleged as some of the overt acts various preparations to use force against certain individuals, including Telephone Company executives, to deter opposition to affiliation with the Teamsters (46-50). The second count charged a conspiracy to commit the crimes of injury to property and injury to telephone property (51-3). The defendants pleaded not guilty on June 19 (54, 55, 61, 66, 71, 76).

On September 17, in the Motion Part of Supreme Court, the defendants moved for a severance, a bill of particulars, and suppression of any evidence obtained by eavesdropping after counsel filed notices of appearances (4-29). The defendants requested a specification whether evidence obtained by court-ordered eavesdropping was used against them (9, 16-17). By opinion dated October 6, 1964, the court (SCHWEITZER, J.) denied the applications, noting:

> "The motion for an order to suppress the use of certain recorded conversations is denied (People v. Golly, 250 N. Y. S. 2d 210). However, the defendants are not precluded from raising any constitutional issue regarding the admissibility of this evidence at the time of trial. See People v. Laverne, 14 N. Y. 2d 304 (1964) where it was held that Title II-B of the Code of Criminal Procedure (813-a et seq.) applies only to tangible property" (45).

On February 1, 1965, the trial began. The case against co-defendant Griffin was severed (100, 121-2) and the remaining defendants made a new motion for severance. A juror was sworn, and the matter was adjourned to February 8 (120, 127). However, arguments and reargruments on the motion extended to March 9, when the motion was denied (103, 104, 112, 113, 127). The trial was begun anew on March 10, the juror previously sworn being discharged (132). The prosecutor stated that he intended to offer at trial certain conversations, recorded by court order (133-41). Copies of the papers were given the defendants (141-3), and the trial was adjourned for two days (141-2). On March 12, when the trial resumed, the defendants moved to exclude the recorded conversations from evidence, on the ground that the orders were invalid (144-58, 163-6). The court reserved decision, the trial was adjourned until Monday, March 15, when the court denied the motions (167).

The defendants then requested an evidentiary hearing, to inquire into all constitutional questions pertaining to the recordings (168), as well as "audibility, source and other matters" (168). Decision was reserved, and the selection of the jury was begun (174-6). The voir dire continued for the rest of the week, through March 19, by which time twelve jurors had been sworn (180-220).

On Monday, March 22, the court held an evidentiary hearing as to the eavesdropping orders (121, 122). After colloquy and stipulations concerning the orders (221-33), the defendants called the trial prosecutor as a witness. He testified as to matters alluded to in the affidavits that were presented upon the applications for the eavesdropping or-

ders. The court held the evidence admissible (244-5), and later entered an opinion with findings (115-19).

The day after the court ruled the recordings admissible, on March 23, 1965, the defendants moved to withdraw their pleas of not guilty, and were permitted to plead guilty to conspiracy to commit the crime of assault in the third degree, under the first count of the indictment (56, 62, 67, 77, 247-55). In so pleading, the defendants stated that they intended to preserve their "right" to contest the eavesdropping orders on appeal (248, 249, 250).

The Appellate Division, First Department, of the Supreme Court of the State of New York dismissed appellants' appeals, on the ground that in the absence of a permissive statute a plea of guilty poses no question for review; Section 813-c of the New York Code of Criminal Procedure, authorizing appellate review of pre-trial rulings on motions to suppress evidence notwithstanding a plea of guilty, does not apply to eavesdropped conversations obtained under Section 813-a of the Code. Under the circumstances of the case, however, and on the district attorney's concession on appeal, withdrawal of the pleas of guilty was warranted in the interest of justice [25 A. D. 2d 182, 268 N. Y. S. 2d 94 (March 29, 1966)].

On appeal to the New York Court of Appeals, appellants renewed their claims as to eavesdropping, and contended that the Appellate Division misinterpreted the state procedural statutes governing appeals. Appellee contended that the Appellate Division orders dismissing the appeals were not reviewable by the Court of Appeals, since they were not "final determinations" within the meaning of

Section 519(5) of the New York Code of Criminal Procedure, dealing with the jurisdiction of the Court of Appeals. This argument was rejected, the Court of Appeals ruling that the Appellate Division orders were appealable "on the merits." As to the "merits," the Court of Appeals agreed with the Appellate Division's interpretation of the state procedural statutes governing appeals, and affirmed that court's dismissal of the appeals. The Court of Appeals also ruled that appellants were free to withdraw their pleas of guilty.*

The Federal Questions Sought to be Reviewed were not Passed Upon.

Appellants' jurisdictional statements in this Court are devoted entirely to the admissibility of evidence obtained by court-ordered eavesdropping, a matter not passed upon on the state appeal; although the Court of Appeals deemed the Appellate Division orders reviewable "on the merits" (jurisdictional sta. of Habel, *et al.*, p. 9), this meant only that the narrow procedural question of appealability considered by the intermediate appellate court could be reviewed by the Court of Appeals. As to the statute appellants seek to draw in question, the Court of Appeals gave no "decision * * * in favor of its validity" [28 U. S. C. §1257(2)]. By the same token, appellants present no discussion whatever of the procedural questions ruled upon by the state appellate courts. Since "the federal question sought to be reviewed was not timely or properly raised,

* The jurisdictional statement of appellants Habel, McGovern and Rodriguez mistakenly reports that the Court of Appeals and the Appellate Division affirmed the appellants' convictions (pp. 1, 2).

or expressly passed on," it is not reviewable here [U. S. Sup. Ct. R. 16(1)(b)]. On appeal from a state court, appellants must show that "the rulings of the court" by their "nature" present a substantial federal question [U. S. Sup. Ct. R. 15(e)]; this appellants do not even attempt.

The Rulings Sought to be Reviewed Rest on an Independent and Adequate State Ground

The orders of the Court of Appeals and the Appellate Division rest on "an adequate non-federal basis" [U. S. Sup. Ct. R. 16(1)(b)], the wholly reasonable interpretation of state appellate requirements. Appellants make no suggestion that this was not an independent and adequate state ground for decision.

There is no federal constitutional requirement of pre-trial review of the admissibility of evidence obtained by eavesdropping, or any other question of evidence, or for review of such questions on appeal after a plea of guilty [*Siegel* v. *People*, 16 N.Y.2d 330 (1965), *cert. denied* —— U. S. —— (June 6, 1966); see *United States ex rel. Boucher* v. *Reincke*, 341 F.2d 977, 980-981 (2d Cir. 1965); *Alexander* v. *United States*, 290 F.2d 252 (5th Cir. 1961)]. The federal pre-trial motion to suppress has been applied to eavesdropping evidence in federal cases [see Fed. R. Crim. Proc. 41], but that experience carries no suggestion of a constitutional mandate. *Mapp* v. *Ohio* [367 U. S. 643, 659, n. 9 (1961)] expressly reserved to the states the formulation of appropriate procedures for enforcing the exclusionary rule of the Fourth Amendment. And Rule 41 itself has no provision for review of evidentiary questions after a plea

of guilty. Moreover, while federal courts purport to apply the Rule *per se* to electronically recorded evidence, in substance the Rule has no effect; as the cases cited by appellants show, the evidence in question is generally discovered only at trial, and the proceedings then amount to an application of the District Court's inherent power to examine questions of admissibility. Present New York remedies for testing the constitutional questions raised by appellants, thus far scorned by appellants, are more than adequate to protect their constitutional rights [see *People* v. *Habel*, 18 N.Y.2d 148, 272 N.Y.S.2d 357, 219 N.E.2d 183 (1966); *People* v. *McCall*, 17 N.Y.2d 152 (1966)]. And the binding option accorded these appellants of withdrawing their pleas precludes any claim of fundamental unfairness.

Conclusion

We respectfully submit, therefore, that the appeals should be dismissed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MICHAEL JUVILER
Assistant District Attorneys
Of Counsel

December, 1966